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No. 95-1932

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1995

ERIC ANTHONY ABRAHAMS,

Petitioner,

v.

YOUNG & RUBICAM INC., ROBERT LOWELL MOORE a/k/a ROBIN MOORE, ARTHUR KLEIN, THOMAS SPANGENBERG, STEVEN M. McKENNA, MIKE SLOSBERG, FREDERICK STURGES, EDWARD J. DALEY, EDWARD NEY and ALEX KROLL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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June 28, 1996

QUESTION PRESENTED

Does the Second Circuit's decision to affirm the dismissal of Petitioner's RICO claims comport with this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992)?

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STATEMENT OF THE CASE

This matter has its origins in a criminal prosecution initiated in October 1989. *United States v. Young & Rubicam Inc.*, 741 F. Supp. 334 (D. Conn. 1990). There, the Government alleged that Young and Rubicam Inc. ("Y&R"), an advertising agency, and two of its employees, had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, by bribing the Petitioner,

in his former capacity as Minister of Tourism of Jamaica, in order to obtain an advertising account of the Jamaican Tourist Board ("JTB"). Throughout the proceeding, Y&R maintained that it had never bribed Petitioner. Nonetheless, Petitioner was indicted, along with Y&R, for violating RICO.

In February 1990, the Government dropped its RICO charges against Y&R and its employees. Y&R pleaded guilty to a one-count information charging conspiracy to violate the Foreign Corrupt Practices Act in violation of 18 U.S.C. § 371. The Government later dismissed the indictment against Petitioner.

On October 7, 1991, Petitioner commenced a civil action against Y&R, several of its present or former employees, and two individuals who had been named as unindicted conspirators in the criminal action. Petitioner's complaint alleged essentially the same RICO scheme as had the Government's indictment, with one twist. Instead of claiming that Y&R had bribed him, Petitioner asserted that Y&R had *not* bribed him, but that he had nonetheless been injured "by reason of" the alleged scheme, within the meaning of 18 U.S.C. § 1964(c), because it had led to his indictment. Plaintiff also asserted claims for violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), for negligence and for defamation.

On June 26, 1992, the district court dismissed all of Petitioner's claims against Y&R and its employees. The court dismissed Petitioner's RICO claims on the ground that, as a matter of law, Petitioner had failed to satisfy his burden of showing that the alleged predicate acts proximately caused his alleged injuries. *Abrahams v. Young & Rubicam Inc.*, 793 F. Supp. 404, 406-07 (D. Conn. 1992). In documenting Petitioner's failure, the court noted that the complaint did not even allege that the purported RICO acts directly caused him any harm, and, instead, "suggest[ed] unequivocally that it was the indictment against him, and the subsequent publicity"

which caused his alleged injuries. *Id.* at 406. The court held that any claim for these indirect injuries was based on a causal connection "too tenuous" to satisfy the element of proximate cause under RICO. *Id.* The district court dismissed Petitioner's state law claims for similar reasons. *Id.* at 407.

On March 8, 1996, the United States Court of Appeals for the Second Circuit affirmed the dismissal of Petitioner's RICO claims. *Abrahams v. Young & Rubicam Inc.*, 79 F.3d 234 (2d Cir. 1996). The court noted that "[t]he relationship between the predicate acts and [Petitioner's] injuries is analogous to that of other RICO plaintiffs to whom we have denied relief". *Id.* at 238. It found the causal link between the alleged RICO scheme and Petitioner's claimed injuries legally insufficient in that Petitioner's "injuries did not flow from the harms that the predicate acts— bribery, kickbacks, extortion, fraud—were intended to cause and the laws against them were intended to prevent". *Id.* Rather, the injuries, if any, resulted from the "fallout from the scheme's exposure". *Id.* at 239. Accordingly, the court affirmed the dismissal of the RICO claims and of certain other claims. *Id.* Holding that the causal analysis under RICO was not necessarily dispositive of the state law claims, the Court of Appeals certified Petitioner's CUTPA claim to the Connecticut Supreme Court and remanded his common law negligence and defamation claims to the district court for further proceedings. *Id.* at 239-240.

ARGUMENT

Both the district court and a unanimous panel of the court of appeals dismissed Petitioner's claims alleging violation of RICO and conspiracy to violate RICO. In each instance the court determined that Petitioner had failed to plead a sufficient causal connection between the alleged predicate acts and his claimed injury. There is nothing in that conclusion meriting, much less requiring, review by this Court. This outcome below represents a straightforward application of limitations on the breadth of RICO damages identified by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

Furthermore, the decision below is not in conflict with that of any other court of appeals. Thus a decision by this Court would not offer any substantial guidance to, or resolve any conflicts between, the lower courts. Nor does Petitioner contend that the Second Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power". Sup. Ct. R. 10(a).

I. THE SECOND CIRCUIT PROPERLY APPLIED *HOLMES*.

Petitioner's arguments stem from a fundamental misreading of the Second Circuit's decision. Petitioner asserts that, in deciding the case below, the Second Circuit "was faced with a situation where the application of traditional principles of proximate cause could only result in allowing recovery". (Pet. 6) As a result, he argues, the Second Circuit "abandoned the use of proximate cause as an analytical tool for determining whether illegal acts give rise to civil liability". (Pet. 5) This is not true. In fact, the Second Circuit

properly dismissed Petitioner's RICO claims using an analysis entirely in accord with *Holmes*.[1]

In *Holmes*, this Court held that RICO contained a proximate cause requirement, and discussed the parameters of that requirement. It focused on one element of proximate cause: the directness of the relationship "between the injury asserted and the injurious conduct alleged". 503 U.S. at 268. This requirement of a direct relation was held to generally preclude recovery by "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts". *Id.* at 268-69.

The Second Circuit had applied the proximate cause standard articulated in *Holmes* prior to this Court's decision. *See Sperber v. Boesky*, 849 F.2d 60, 63-65 (2d Cir. 1988) (holding that plaintiffs' injuries were not proximately caused by defendant's insider trading since plaintiffs were "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer"); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (holding that plaintiff's loss of sales commissions was not proximately caused by defendants' RICO scheme since plaintiff was

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[1] The Second Circuit distinguished between proximate cause analysis as applied to common-law claims and statutory claims. After observing that the analysis in the two settings need not be coterminous, the Second Circuit noted that to show proximate cause in a suit on a statute the plaintiff must demonstrate (1) that he is within the class the statute sought to protect, and (2) that the harm done was one that the statute meant to prevent. 79 F.2d 234, 237. Contrary to Petitioner's assertion, this test did not signal an abandonment of the principle of proximate causation. As the court noted:

> The courts that have employed causation language have used that language *to ask precisely the same questions that we ask*—that is, was the plaintiff in the category of people meant by the statute to be safeguarded, and was the harm that which the act meant to avoid? *Id.* at 237 n.3 (emphasis added).

"neither the target of the racketeering enterprise nor the competitor[] nor the customer[] of the racketeer[s]") (citation omitted; brackets in original). Indeed, this Court cited the *Sperber* decision with approval in *Holmes*. 503 U.S. at 266 n.11. Following *Holmes*, the Second Circuit has continued to apply the proximate cause standard. In *In re American Express Co. Shareholder Litigation*, 39 F.3d 395, 400 (2d Cir. 1994), the court of appeals denied recovery to shareholders of American Express on the ground that they "were certainly not the intended targets of the RICO violations" that were alleged in that case but were injured "only because the scheme itself was exposed".

The Second Circuit properly applied the above precedents to the case at bar. Indeed, the court prefaced its discussion of Petitioner's RICO claims by noting that "[t]he relationship between the predicate acts and Abrahams's injuries is analogous to that of other RICO plaintiffs to whom we have denied relief".[2] 79 F.3d at 238. The court found that "Abraham's failure to establish a RICO claim stems from the fact that he was not 'the target of the racketeering enterprise'". *Id.* (citation omitted). His injuries were not proximately caused by defendants' actions since the "Y&R scheme was designed to corrupt the process by which the JTB advertising contract was let and to disadvantage Y&R's rivals for that contract". *Id.* Accordingly, "Abrahams was neither an intended target of the scheme nor an intended beneficiary of

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[2] The court made clear that the language it used in considering Petitioner's claim did not alter its analysis in any fundamental way:

> "It may therefore seem that the difference in ways of speaking is of no significance. In one sense, that is true. And the results of all the cases cited [*Holmes*; *American Express*; *Hecht*; *Sperber*] are completely consistent with the result we reach today." 79 F.3d at 237 n.3.

the laws prohibiting it". *Id.* Petitioner was only injured "by the fallout from the scheme's exposure". *Id.* at 239.

Petitioner also contends that the Second Circuit misapplied *Holmes*. He argues that he was, indeed, the "target" of the alleged bribery scheme and hence his injury was directly caused by the alleged predicate acts. (Pet. 6-7) This argument was made to the Second Circuit (*see* Motion of Appeal at 16-20; Reply Brief of Plaintiff-Appellant at 7-14) and rejected. Petitioner now contends, in essence, that application of the *Holmes* standard *should* have resulted in a ruling in his favor. A petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Petitioner identifies no reason for departing from that norm here, and there is none.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioner argues that the decision below conflicts with the decisions of other circuits. (Pet. 9) It does not.

Petitioner's misreading of the Second Circuit's decision has infected his argument regarding a circuit split. He cites cases from several circuits for their holding that RICO plaintiffs must prove proximate causation. (Pet. 9) The purported split derives from Petitioner's argument that the Second Circuit has abandoned proximate causation. As this claim is inaccurate, there is no split.

Petitioner also argues that the Second Circuit's holdings in *American Express*, *Hecht* and *Sperber*, which require proximate causation, are "strikingly different from those in other circuits". (Pet. 6) To support this argument, Petitioner cites three cases decided prior to this Court's decision in *Holmes*. Petitioner misstates the holding of one of these cases, *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988). The court there did not allow the plaintiffs to recover, but dismissed their complaint for lack of standing. *Id.* at 12-13. In the two

other cases cited, *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984), *vacated*, 473 U.S. 922 (1985), and *Terre du Lac Ass'n v. Terre du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), the Eighth Circuit held that a plaintiff who was indirectly injured by a defendant's RICO violations could, consistent with the proximate cause requirement, seek damages under civil RICO. Petitioner fails to mention that in *Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir.), *cert. denied*, 114 S.Ct. 81 (1993), a case decided after *Holmes*, the Eighth Circuit noted that "[a]ny inconsistencies that potential future applications of those decisions [*Alexander Grant* and *Terre du Lac*] may bring to light are, of course, foreclosed by the Supreme Court's holding in *Holmes*". 987 F.2d at 1325 n.4.

In short, what Petitioner has documented is the circuit split that led to *Holmes* rather than a new split that might warrant review by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

June 28, 1996

Respectfully submitted,

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APPENDIX A

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, respondent Young & Rubicam Inc. identifies the parent companies and non-wholly owned subsidiaries of Young & Rubicam Inc. as follows:

Yellow & Red S.r.l.; DY&R Advertising Company Ltd.; Media Buying Co.; Equmedia; Michael Hogg Y&R; Mediapolis; Commercial Presentations Group Ltd.; Horizons Media S.A.; Promovico Cato Johnson AG; Lumiere Sarl; Visser, Bay, Anders Toscani BV; Kulling & Partnner Design AG; CCCL (UK); Prima Europe Ltd; Corporate Vision Ltd. (UK); Comsult AG; DY&R Co. Ltd.; Trefpunt Sports & Leisure Marketing B.V.; Charles Barker GmbH (Germany); Wunderman Steiner AG; Mattingly & Partners Group Pty Ltd; Mattingly & Partners Holding Pty Ltd.; Mattingly & Partners Advertising Pty Ltd; Mattingly & Partners Advertising (NSW) Pty Ltd; William Roberts Advertising Pty Ltd; Total Media Aust Unit Trust; Gasworks Pty Ltd; Assembly Line Pty Ltd; Monahan Dayman Adams (Gold Coast) Pty Ltd; Stevens Tulk Dawson Advertising Pty Ltd; Issues Australia Pty Ltd; B.V. Arbeidsmarkt Communicatie Adviesbureau BV; DY&R Korea; Omo-Delta; Vinizius/Young & Rubicam SA; The Finished Type Inc.; DY&R Limited; Triangle Pacific Mkting & Promotion Ltd.; Oriental Source Premiums & Merchandise Ltd.; Amitel Italia S.r.l.; Marketing & Telematica S.r.l.; DY&R KK; DY&R DSH KK; Mattingly & Partners Advertising Auckland Ltd; Endicott Enterprises Limited; Agincourt Agency Limited; DY&R Alcantara; DY&R Advertising PTE LTD; DY& R Limited; Sudler & Hennessey/Gall Inc.; Firstcom Marketing Inc.; Dentsu Bm Co Ltd; Phoenix Travel (Mornington) Ltd; Orozco & Telmo Lda.; Y&R Czechoslovakia; Riechelmann, Lopes Cardozo & Van Bercum BV; Young & Rubicam Media Pro S.r.l.; G&R

Publicita - Sudler & Hennessey S.r.l.; Geo II Advertising S.A.; Y&R Damaris C Por A; Investigaciones Mercadeo C Por A; Team/Young & Rubicam Lda.; Consult Communications Strategy BV; Young & Rubicam Raklam AS (Reklamevi); Advico/Young & Rubicam AG; Sigma AG; Cato Johnson S.A.; MDLP; Verhoeff & Partners v.o.f.; FSD Y&R; Oy Taucher, Young & Rubicam Ab; Wunderman Worldwide v.o.f.; Cato Johnson v.o.f.; Studio 92; Le Projet (Pty) Ltd; Y&R South Africa Pty Ltd; Rayon Vert Conseil S.A.; Intramed Communications S.r.l.; Young & Rubicam Quest; Format Limited; Burson-Marsteller (Malaysia) Sdn Bhd; Creative Medical Communications S.r.l.; Walter Landor, Asociados SA; Y&R De Argentina Sa; B-M Thailand Ltd; Wunderman Wunderworld Mexico SA de CV; PI Participacoes S/C Ltda; Burson-Marsteller (Hong Kong) Ltd; B-M China Ltd; Cato Johnson Italia S.p.A.; Silverado S.r.l.; Burson-Marsteller S.A.; City & Corporate Counsel Ltd.; S&H Participacoes S/C Ltda; Young & Rubicam Espana S.A.; Wunderman Worldwide S.A.; Cato Johnson S.A.; Burson-Marsteller S.A.; Y&R/GSI LTD.; Y&R Zambia Ltd.